

CONSTITUTIONAL LAW

RULE-STATEMENT CHECKLIST

IV. INDIVIDUAL RIGHTS

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A. STATE ACTION

GENERAL RULE The constitutional guarantees of individual rights generally restrain only governmental action, so a private actor is bound only where it performs a traditional and exclusive public function or is so entangled with the government that its conduct is fairly attributable to the state.

- ☐ **State action requirement.** The Constitution's protections apply only to conduct by federal, state, or local government or those acting on its behalf; purely private conduct is not restrained absent an applicable statute.
- ☐ **Public function.** A private party is treated as a state actor when it performs a function that is traditionally and exclusively reserved to the state, such as running elections or operating a company town.
- ☐ **Entanglement or significant involvement.** Private conduct becomes state action when the government affirmatively facilitates, encourages, or authorizes it, or is so intertwined with the private actor that the two are joint participants.
- ☐ **Congressional reach.** The Thirteenth Amendment reaches purely private racial discrimination, while the Fourteenth and Fifteenth Amendments require state action, and Congress may enforce them under Section 5 only by remedying identified constitutional violations with congruent and proportional legislation.

B. DUE PROCESS

GENERAL RULE The Due Process Clauses of the Fifth Amendment (federal) and Fourteenth Amendment (states) bar deprivation of life, liberty, or property without due process; procedural due process asks what process is required before a deprivation, while substantive due process asks whether the government has an adequate justification for the deprivation itself.

- ☐ **Procedural due process trigger.** Procedural due process applies only to intentional or reckless government deprivation of an individual's life, liberty, or property interest, not to mere negligence.
- ☐ **Property and liberty interests.** A protected property interest requires a legitimate claim of entitlement created by an independent source such as statute or contract, not a mere expectation; protected liberty includes freedom from physical restraint and certain fundamental rights.
- ☐ **Process due (balancing).** The process required is determined by balancing the private interest affected, the risk of erroneous deprivation and the value of additional safeguards, and the government's interest including administrative burden.
- ☐ **Notice and hearing.** Due process generally requires notice reasonably calculated to apprise the party and an opportunity to be heard at a meaningful time and manner, ordinarily before the deprivation for interests such as welfare benefits.
- ☐ **Substantive due process standard.** Laws burdening a fundamental right receive strict scrutiny and must be necessary to a compelling government interest; laws affecting non-fundamental economic or social interests receive rational basis review.
- ☐ **Fundamental rights.** Fundamental rights protected by substantive due process include the rights to marry, to procreate, to custody and rearing of one's children, to marital and family privacy, to contraception, to travel interstate, to vote, and to refuse unwanted medical treatment.
- ☐ **Economic regulation.** Economic and social welfare legislation is presumed valid and upheld under rational basis if it is rationally related to any legitimate government interest, regardless of the legislature's actual motive.

C. EQUAL PROTECTION

GENERAL RULE Equal protection, applied to the states through the Fourteenth Amendment and to the federal government through Fifth Amendment due process, forbids unjustified government classification of persons; the level of scrutiny depends on the classification or right involved, and a facially neutral law triggers heightened review only if there is both discriminatory intent and discriminatory effect.

- ☐ **Strict scrutiny (suspect classifications).** Classifications based on race, national origin, or alienage (state law) and those burdening a fundamental right receive strict scrutiny; the law is upheld only if it is necessary to achieve a compelling government interest, with the burden on the government.
- ☐ **Intermediate scrutiny (quasi-suspect).** Classifications based on gender or legitimacy receive intermediate scrutiny; the law is upheld only if it is substantially related to an important government interest, and gender classifications additionally require an exceedingly persuasive justification.
- ☐ **Rational basis (all other classifications).** Classifications such as age, disability, wealth, and economic regulation receive rational basis review; the law is upheld if it is rationally related to any legitimate government interest, with the burden on the challenger.
- ☐ **Discriminatory intent requirement.** A facially neutral law that is applied or administered in a discriminatory manner or enacted with a discriminatory purpose triggers heightened scrutiny; discriminatory impact alone is insufficient.
- ☐ **Alienage nuances.** State discrimination against aliens generally gets strict scrutiny, but only rational basis applies to laws limiting participation in self-government or important elective and non-elective public functions; federal alienage classifications get rational basis due to the federal immigration power.
- ☐ **Affirmative action.** Race-conscious government action is subject to strict scrutiny even when benign, and remedial classifications must serve a compelling interest such as remedying identified past discrimination by that entity.

D. TAKINGS

GENERAL RULE The Fifth Amendment, applied to the states through the Fourteenth, bars the taking of private property for public use without just compensation; a taking may be a physical appropriation or a regulation that goes too far.

- ❑ **Public use.** The public use requirement is satisfied so long as the government's taking is rationally related to a conceivable legitimate public purpose, including transfer to private parties for economic development.
- ❑ **Per se physical taking.** A permanent physical occupation of property authorized by the government is a per se taking requiring just compensation regardless of how small the intrusion or how important the public interest.
- ❑ **Per se regulatory taking.** A regulation that denies an owner all economically viable use of the land is a per se taking unless the restriction inheres in the title under background principles of nuisance or property law.
- ❑ **Regulatory balancing.** A regulation that merely decreases value is analyzed by balancing the economic impact on the owner, the extent of interference with distinct investment-backed expectations, and the character of the government action.
- ❑ **Exactions.** A government condition on development permits requiring the owner to give up property is a taking unless there is an essential nexus to a legitimate state interest and rough proportionality between the condition and the impact of the proposed development.
- ❑ **Just compensation.** Just compensation is measured by the fair market value of the property taken at the time of the taking, that is, the loss to the owner, not the gain to the government.

E. RETROACTIVE LEGISLATION AND CONTRACTS

- ❑ **Contracts Clause.** The Contracts Clause bars only state laws that substantially impair existing contracts; impairment of private contracts is valid if it reasonably and narrowly serves an important and legitimate public interest, while impairment of the state's own contracts receives more searching review.
- ❑ **Ex post facto laws.** Neither Congress nor the states may pass an ex post facto law, meaning a retroactive criminal statute that punishes previously innocent conduct, increases the punishment, or reduces the evidence required for conviction.
- ❑ **Bills of attainder.** Neither Congress nor the states may pass a bill of attainder, meaning a legislative act that inflicts punishment on named individuals or an easily ascertainable group without a judicial trial.

F. FIRST AMENDMENT: SPEECH, PRESS, AND ASSOCIATION

GENERAL RULE Government regulation of speech that is content-based, meaning it targets subject matter or viewpoint, is presumptively invalid and must survive strict scrutiny; content-neutral regulation of the time, place, and manner of speech is subject to intermediate scrutiny.

- ❑ **Content-based restrictions.** A regulation that restricts speech because of its message, subject matter, or viewpoint must be necessary to serve a compelling government interest and be narrowly tailored, and is otherwise unconstitutional.
- ❑ **Time, place, and manner.** In a public or designated public forum, content-neutral restrictions are valid if they are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.
- ❑ **Nonpublic forum.** In a nonpublic forum, government may restrict speech if the regulation is viewpoint-neutral and reasonably related to a legitimate government interest.
- ❑ **Prior restraints.** A prior restraint that prevents speech before it occurs bears a heavy presumption against validity; any licensing scheme must have narrow, definite standards, prompt determination, and judicial review.
- ❑ **Overbreadth.** A law regulating speech is facially invalid for overbreadth if it restricts substantially more protected speech than the Constitution allows, and a litigant may challenge it even if that person's own speech is unprotected.
- ❑ **Vagueness.** A law regulating speech is void for vagueness if a reasonable person cannot tell what expression is prohibited, and laws that vest officials with unfettered discretion are also invalid.
- ❑ **Incitement.** Speech advocating unlawful action is unprotected only if it is directed to inciting imminent lawless action and is likely to produce such action.
- ❑ **Fighting words and true threats.** Fighting words, meaning personally abusive words likely to provoke an immediate violent reaction, and true threats are unprotected, though fighting words statutes are often struck as vague or as viewpoint-based.
- ❑ **Obscenity.** Speech is obscene and unprotected if, applying contemporary community standards, it appeals to the prurient interest in sex, portrays sexual conduct in a patently offensive way as defined by law, and taken as a whole lacks serious literary, artistic, political, or scientific value.
- ❑ **Commercial speech.** Truthful commercial speech about lawful activity may be regulated only if the government interest is substantial, the regulation directly advances that interest, and it is narrowly tailored though not necessarily the least restrictive means; false, misleading, or illegal commercial speech is unprotected.
- ❑ **Defamation and public concern.** When a defamation plaintiff is a public official or figure or the speech is of public concern, the First Amendment requires proof of fault, and public plaintiffs must show actual malice, meaning knowledge of falsity or reckless disregard for the truth.
- ❑ **Symbolic conduct.** Regulation of expressive conduct is valid if it is within the government's power, furthers an important interest unrelated to the suppression of speech, and the incidental burden on expression is no greater than necessary.
- ❑ **Freedom of association.** Laws that burden the freedom of association receive strict scrutiny, and a person may be punished for group membership only if the person is an active member with knowledge of and specific intent to further the group's illegal aims.

G. FIRST AMENDMENT: RELIGION

GENERAL RULE The First Amendment, applied to the states through the Fourteenth, both bars the government from establishing religion and protects the free exercise of religion.

- ❑ **Establishment Clause.** Government action challenged under the Establishment Clause is assessed by reference to historical practices and understandings, and government may not coerce religious participation, favor one sect over another, or endorse religion over nonreligion.
- ❑ **Free exercise: neutral laws.** A neutral law of general applicability that incidentally burdens religious conduct is valid without heightened scrutiny, even if it makes religious practice more difficult.
- ❑ **Free exercise: targeting religion.** A law that is not neutral or not generally applicable because it targets religious conduct or grants secular exemptions but not religious ones must satisfy strict scrutiny.
- ❑ **Belief protection.** The government may never punish or burden religious belief itself, and courts may not decide the truth or falsity of religious claims.

III. THE RELATION OF NATION AND STATES IN A FEDERAL SYSTEM

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A. COMMERCE, TAXING, AND SPENDING POWERS

GENERAL RULE Congress has no general police power and may act only pursuant to an enumerated power, but the commerce, taxing, and spending powers together give Congress broad regulatory authority.

- ❑ **Commerce power.** Congress may regulate the channels of interstate commerce, the instrumentalities of and persons or things in interstate commerce, and activities that have a substantial effect on interstate commerce, aggregating the effect of economic activity across the nation.
- ❑ **Limits on commerce power.** Congress may not compel individuals to engage in commerce, and its power to regulate does not extend to noneconomic activity whose connection to interstate commerce is merely attenuated.
- ❑ **Taxing power.** A congressional tax is valid if it bears some reasonable relationship to revenue production or if Congress otherwise has power to regulate the taxed activity.
- ❑ **Spending power.** Congress may spend for the general welfare and may attach conditions on the receipt of federal funds if the conditions are clearly stated, relate to the purpose of the program, are not unduly coercive, and do not require unconstitutional action.
- ❑ **Necessary and Proper Clause.** Congress may enact any law that is a rationally related and appropriate means of carrying out one of its enumerated powers, but this clause is not itself an independent source of power.

B. TENTH AMENDMENT AND FEDERAL LIMITS ON STATES

- ❑ **Tenth Amendment.** Powers not delegated to the federal government nor prohibited to the states are reserved to the states or the people, and Congress may not commandeer state legislatures or executives by compelling them to enact or enforce a federal regulatory program.
- ❑ **Anti-commandeering scope.** Congress may regulate states through generally applicable laws and may induce state action through the spending power, but it may not order a state to administer federal law or prohibit the state from legislating.

C. DORMANT COMMERCE CLAUSE

GENERAL RULE Even without congressional action, the Commerce Clause of its own force restricts state and local laws that burden interstate commerce; the analysis turns on whether the law discriminates against interstate commerce or merely burdens it incidentally.

- ❑ **Discriminatory laws.** A state or local law that discriminates against out-of-state commerce to protect local economic interests is virtually per se invalid unless the state shows the law is necessary to achieve an important noneconomic interest with no reasonable nondiscriminatory alternative.
- ❑ **Nondiscriminatory burdens.** A nondiscriminatory law that only incidentally burdens interstate commerce is valid unless the burden imposed on interstate commerce clearly outweighs the legitimate local benefits.
- ❑ **Market participant exception.** The dormant Commerce Clause does not apply when a state acts as a market participant rather than a regulator, so a state may favor its own citizens when buying, selling, hiring, or subsidizing.
- ❑ **Congressional consent and traditional functions.** Congress may authorize state laws that would otherwise violate the dormant Commerce Clause, and the doctrine does not restrict a state performing a traditional government function such as providing for waste disposal on its own behalf.

D. PRIVILEGES AND IMMUNITIES

- ❑ **Article IV Privileges and Immunities.** A state may not discriminate against nonresident individuals with respect to fundamental rights or important economic activities such as pursuit of a livelihood unless the discrimination is substantially related to a substantial state interest, and corporations and aliens are not protected.
- ❑ **Fourteenth Amendment Privileges or Immunities.** The Fourteenth Amendment Privileges or Immunities Clause protects only the narrow rights of national citizenship, such as the right to travel and to petition Congress, and is rarely a correct answer.

E. PREEMPTION AND INTERGOVERNMENTAL IMMUNITIES

- ❑ **Express and conflict preemption.** Under the Supremacy Clause, federal law preempts state law when Congress expressly so provides, when compliance with both is impossible, or when the state law obstructs the accomplishment of federal objectives.
- ❑ **Field preemption.** State law is preempted where the scheme of federal regulation is so pervasive or the federal interest so dominant that Congress is inferred to have intended to occupy the entire field.
- ❑ **Federal immunity from state tax and regulation.** States may not directly tax or regulate the federal government or its instrumentalities without congressional consent, though nondiscriminatory indirect taxes on federal contractors are generally permitted.
- ❑ **State immunity from federal tax.** The federal government may tax and regulate the states, but a nondiscriminatory federal tax on the states is limited where it would impair the states' ability to perform basic government functions.

II. THE SEPARATION OF POWERS

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A. LEGISLATIVE AND EXECUTIVE POWERS

- ☐ **Nondelegation.** Congress may delegate legislative power to the executive or agencies so long as it provides an intelligible principle to guide the exercise of that power, a limit that is rarely found violated.
- ☐ **Bicameralism and presentment.** Congress may exercise legislative power only through passage by both houses and presentment to the President, so the legislative veto and the line item veto are unconstitutional.
- ☐ **Executive power over foreign and domestic affairs.** The President's power is at its maximum when acting with congressional authorization and at its lowest when acting against the express or implied will of Congress; the President has broad authority over foreign affairs but no power to make domestic law.
- ☐ **Treaties and executive agreements.** Treaties negotiated by the President and ratified by two-thirds of the Senate are supreme over conflicting state law, while executive agreements do not require Senate consent but yield to conflicting federal statutes.

B. APPOINTMENT AND REMOVAL

- ☐ **Appointment power.** The President appoints principal officers with the advice and consent of the Senate, and Congress may vest the appointment of inferior officers in the President, the courts, or department heads, but Congress may not itself appoint officers who execute the laws.
- ☐ **Removal power.** The President may generally remove executive officers at will, but Congress may impose good-cause limits on the removal of officers whose independence from the President is warranted, and Congress may remove officers only through impeachment.

C. IMMUNITIES AND PRIVILEGES

- ☐ **Executive immunity.** The President has absolute immunity from civil liability for official acts within the outer perimeter of duty and at least presumptive immunity for official acts, but has no immunity for purely private conduct.
- ☐ **Executive privilege.** The President enjoys a qualified privilege to keep executive communications confidential, but that privilege must yield to a demonstrated specific need for evidence in a criminal proceeding.
- ☐ **Legislative immunity.** Under the Speech or Debate Clause, members of Congress and their aides are immune from civil or criminal liability for statements and conduct in the regular course of the legislative process, but not for political acts such as speeches outside Congress.
- ☐ **Impeachment.** The President, Vice President, and civil officers may be impeached by a majority of the House and removed on conviction by two-thirds of the Senate for treason, bribery, or other high crimes and misdemeanors.

I. THE NATURE OF JUDICIAL REVIEW

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A. JUSTICIABILITY

GENERAL RULE Federal courts may decide only actual cases or controversies, so a plaintiff must satisfy the doctrines of standing, ripeness, mootness, and the political question bar before a court will reach the merits.

- ☐ **Standing: injury.** A plaintiff must have suffered or imminently face a concrete and particularized injury in fact; a generalized grievance shared by all citizens or taxpayers is insufficient.
- ☐ **Standing: causation.** The plaintiff's injury must be fairly traceable to the challenged conduct of the defendant and not the result of the independent action of a third party not before the court.
- ☐ **Standing: redressability.** It must be likely, not merely speculative, that a favorable court decision will redress the plaintiff's injury.
- ☐ **Third-party and organizational standing.** A litigant generally may not assert the rights of others, except where there is a close relationship or obstacle to the third party suing; an organization has standing if its members would have standing, the interest is germane to its purpose, and neither the claim nor relief requires member participation.
- ☐ **Ripeness.** A claim is not ripe unless the plaintiff faces a real and immediate threat of harm, considering the fitness of the issues for judicial decision and the hardship of withholding review.
- ☐ **Mootness.** A live controversy must exist at all stages, so a case is dismissed as moot if events end the dispute, unless the issue is capable of repetition yet evading review, the defendant voluntarily ceases but is free to resume, or it is a properly certified class action.
- ☐ **Political question.** Federal courts will not decide political questions, meaning issues committed by the Constitution to another branch or inherently lacking manageable judicial standards, such as partisan gerrymandering and the conduct of foreign policy.

B. JURISDICTION AND SUPREME COURT REVIEW

- ☐ **Supreme Court review.** The Supreme Court has original jurisdiction over cases affecting ambassadors and those in which a state is a party, and hears other cases by discretionary writ of certiorari; its appellate jurisdiction is subject to congressional exceptions and regulations.
- ☐ **Adequate and independent state grounds.** The Supreme Court will not review a state court judgment that rests on an adequate and independent state law ground, because reversal of the federal ruling would not change the outcome.

C. THE ELEVENTH AMENDMENT

- ☐ **Sovereign immunity.** The Eleventh Amendment and the principle of state sovereign immunity bar private suits against a state for damages in federal court, and also bar such suits in state courts and federal agencies, absent an exception.
- ☐ **Exceptions.** State sovereign immunity does not bar suits against state officers for injunctive relief or for damages payable out of their own pockets, suits where the state consents, or suits where Congress validly abrogates immunity under its Fourteenth Amendment enforcement power; local governments are not protected.